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Supreme Court, U.S.
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No. ___

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

CORY GARDINER, et al.,
Petitioners,

v.

SEA-LAND SERVICE, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

Seven union seamen brought a class action asserting their right under general maritime law to payments for maintenance greater than the $8.00 per day paid them by the defendant shipowners. "Maintenance" is the duty of the shipowner to pay a seaman who becomes ill or injured while in the service of the ship sufficient funds to purchase food and lodging equivalent to that provided aboard ship. The $8.00 per day rate was first set in collective bargaining agreements beginning in 1951 and has never been increased despite years of inflation. The evidence shows that $8.00 is wholly inadequate to purchase daily food and lodging. The questions presented are:

In holding that the admiralty court may not increase the maintenance rate of $8.00 per day in light of national labor policy, did the Court of Appeals improperly

(a) find that the unions and shipowners may bargain away seamen's rights to maintenance sufficient to purchase meals and lodging equivalent to that received aboard ship?

(b) find that the national labor policy underlying collective bargaining agreements would be unduly compromised if general maritime law were held to require greater rates of payment?

LIST OF ALL PARTIES

Petitioners are: CORY GARDINER, WILLIAM E. BISHOP, WILLIAM WHEAT, YUNG KONG HO, JUAN P. SANCHEZ, EUGENE A. CARTER AND ALFONSO DI FABRIZIO.

Respondents are: SEA-LAND SERVICE, INC., DELTA STEAMSHIP LINES INC., AMERICAN PRESIDENT LINES, INC., KEYSTONE SHIPPING CO., LYKES BROS. STEAMSHIP CO., INC., MATSON NAVIGATION CO., UNITED STATES LINES., INC. AND CHEVRON SHIPPING COMPANY.

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CORY GARDINER, et al.,

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SEA-LAND SERVICES, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.[1]

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[1]The petitioners are seven individual seamen: Cory Gardiner, William E. Bishop, William Wheat, Yung Kong Ho, Juan P. Sanchez, Eugene A. Carter and Alfonso DiFabrizio. A class of similarly situated seamen is alleged in the complaint, but the class has not been certified.

The respondents are Sea-Land Services, Inc., Delta Steamship Lines, Inc., American President Lines, Inc., Keystone Shipping Co., Lykes Brothers Steamship Co., Inc., Matson Navigation Co., United States Lines, Inc., and Chevron Shipping Co. A defendant class of all other similarly situated shipowners is also named in the complaint.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals, which is printed in Appendix A, is reported at 786 F. 2d 943. The order of the District Court for the Northern District of California is printed in Appendix B and is reported at 1985 AMC 642. The order of the same court in the related case of *Rutherford v. Sea-Land Services, Inc.*, is printed in Appendix C and reported at 575 F. Supp. 1365.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on April 8, 1986. A timely petition for the rehearing was denied on June 6, 1986. The order denying rehearing is printed in Appendix D. This Court has jurisdiction under 28 U.S.C. Section 1254(l).

CONSTITUTIONAL PROVISION INVOLVED

Article 3, Section 2, of the United States Constitution extends the federal judicial power to "cases of admiralty and maritime Jurisdiction. . . ."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1333(1):

"The district courts shall have original jurisdiction exclusive of the courts of the States, of:

l. Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

STATEMENT OF THE CASE

Maintenance is the affirmative duty of the shipowner to provide a seaman who becomes sick or injured in the service of his vessel with food and lodging comparable to that he received aboard the ship. Maintenance has been said to be a substitute for the free board and lodging the seaman would have received aboard ship but for his incapacity. The right to maintenance originated in the medieval Sea Codes.

The duty to pay maintenance is imposed by the general maritime law and no private agreement is competent to abrogate the shipowner's duty to pay maintenance. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932).

The law forbids the shifting of the shipowner's obligation to pay maintenance to the seaman by making him use his salary for his maintenance needs. *Vaughn v. Atkinson*, 369 U.S. 527 (1962).

Maintenance is, in some respects, the seaman's workmens' compensation. Gilmore and Black, *The Law of Admiralty*, Section 6-6, p. 281 (1975). Many, if not most, seamen are not eligible for state disability pay. Under applicable law, the shipowners designate the state out of which the ships operate and the seamen receive disability according to the designated state's laws. Certain states favored by shipowners either do not provide for disability or sharply limit it. For example, defendants Lykes Brothers Steamship Co. and Delta Steamship Lines, Inc. have designated the State of Louisiana, which provides no disability to workers.

Beginning in 1951 and 1952, the leading maritime unions began to include maintenance rates in their collective bargaining with the shipowners. The rates were set at $8.00 per day and have not been increased since. Simply adjusting for changes in the consumer price index, in 1983 seamen would have needed $31.47 per day to have the same purchasing power as in 1951.

The individual plaintiffs are seamen who have undergone varying periods of disability and have had to subsist on the $8.00 per day, whatever funds they had available, and government assistance.

On August 5, 1983, plaintiffs brought this case seeking damages and a declaration that the $8.00 per day provisions in the collective bargaining agreements were unenforceable under general maritime law as "starvation payments."

In an earlier related case, the district court took judicial notice that $8.00 per day is an unreasonably low sum for obtaining a room and three meals in the San Francisco Bay area. *Rutherford*, 575 F. Supp. at 1370, n. 4 (Appendix C). Expert testimony in this action established that meals would cost $20.00 per day and a safe hotel room would cost at least $30.00 per day in today's dollars in the same area. Plaintiff DiFabrizio was forced to apply for food stamps while disabled because he could not exist on $8.00 per day.

A majority of the Court of Appeals thought that the adequacy of the maintenance rate should be examined in the context of the whole scheme of benefits available under collective bargaining agreements, including overtime, premium and penalty pay for unpleasant tasks, vacation allowances, and such shipboard "amenities" as television sets, films, washers, dryers, ice cream, and baked bread.

The majority held that national labor policy requires that an adequate maintenance rate may be bargained away in exchange for other benefits in collective bargaining (as long as some nominal rate is included in the collective bargaining agreement). The court thought that the national policy of encouraging collective bargaining agreements would be unduly compromised if the rate of maintenance set in the agreements were not enforced. The court also ruled that the general maritime laws were not pre-empted by the labor statutes.

The dissenting judge on the Court of Appeals thought that maintenance may not be bargained away by labor unions pointing out the inequities of union and non-union seamen receiving different maintenance rates and seamen with favorable bargaining contracts with no maintenance terms at all receiving the full cost of their food and lodging while those in less favorable collective bargaining contracts that specify a nominal maintenance rate would receive only that rate.

The dissenting judge also thought it anomalous for the courts to rubberstamp any rate labeled maintenance when the unions have clearly been improvident in adequately protecting disabled seamen's interests.

REASONS FOR GRANTING CERTIORARI

This case presents an important question of admiralty and maritime law that should be settled by this Court.[2] The case has impact on all West Coast union seamen. If left unreviewed, many sick and injured seamen will be destined to live on an inadequate allowance of $8.00 per day and their savings, wages, or vacation pay. It is unfair to force seamen to use their earnings for this purpose or to seek government assistance in the form of food stamps or welfare.

The inadequacy of the $8.00 per day rate for maintenance cannot be denied. In a series of cases involving non-union seamen, the courts have found that $8.00 is inadequate to provide food and lodging equivalent to that received aboard ship in light of today's living costs. *E.g., Incandelea v. Am. Dredging Co.*, 659 F. 2d 11, 13-14 (2d Cir. 1981) (seamen entitled to $26.80 per day in New York City rather than the "union rate" of $8.00 per day); *Wood v. Diamond M Drilling Co.*, 691 F. 2d 1165, 1171 (5th Cir. 1982), Cert. denied, 460 U.S. 1069 (1983) ($30.00 per day upheld).

I. The Finding that the Unions and Shipowners May Bargain Away Seamen's Rights to Adequate Maintenance is in Conflict With the Decisions of this Court and the Court of Appeals for the Fifth Circuit

The decision of the Court of Appeals below conflicts with this Court's decisions, a decision of the Court of Appeals for the Fifth Circuit and the opinions of leading commentators.

This Court has established that maintenance is an affirmative duty externally imposed on the shipowners by the general maritime law which "no agreement is competent to abrogate." *Cortes v. Baltimore Insular Line*, 287 U.S. 367,

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[2] The Court has granted certiorari to consider significant issues in the area of federal specialties such as admiralty. See e.g. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

(1932). *DeZon v. American President Lines, Ltd.*, 318 U.S. 660, 667 (1943).[3]

This Court has also held that a shipowner's liability for maintenance to be among the "most pervasive" of all and that it was not to be defeated by restrictive distinctions nor was it to be "narrowly confined." *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 735 (1943). In this case, that doctrine has not been followed.

The Court of Appeals for the Fifth Circuit has held that a union seaman is entitled to show what sums were necessary to allow him to be able to purchase three cooked meals and lodging similar to that which he received aboard ship. *McWilliams v. Texaco, Inc.*, 781 F. 2d 514 (5th Cir. 1986).

The district court in *McWilliams* had entered a directed verdict for maintenance "at the [union] contract rate of $8.00 per day" and had refused to allow proffered evidence as to the reasonable cost of living in the seaman's hometown of Pineapple, Alabama. The Court of Appeals reversed holding that the lower court should allow evidence to determine if the sums actually expended by the seaman during his convalescence were "adequate to afford him substantial shipboard equivalents." If they were not, the court was directed to take evidence to enable the court to give "full effect" to the doctrine of maintenance. 781 F. 2d at 518.

Although the alleged conflict between national labor policy and the right to maintenance was not discussed, the Court of Appeals in *McWilliams* necessarily held that the right to maintenance takes precedence over the union agreement. Thus, this case and *McWilliams* are in direct conflict over this issue.

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[3]Accord, *Wood v. Diamond M Drilling Co.*, *supra*, 691 F. 2d 1165, 1170, *Sobosle v. United States Steel Corp.*, 359 F. 2d 7, 11 (3rd Cir. 1965); *Dryden v. Ocean Accident & Guarantee Corp.*, 138 F. 2d 291, 293 (7th Cir. 1943).

Norris, a leading maritime law commentator emphatically rejects the idea that collective bargaining agreements should impinge on the right to adequate maintenance:

> It is the duty of the courts, under the general maritime law and in a proved case, to award maintenance in favor of the seaman and the rate thereof . . . . While the rate of maintenance as agreed by the seamen's unions and the shipowners may be considered by the courts when determining the proper amount, nevertheless such agreements should not be followed if they lead to an unjust, inequitable, unreasonable and unrealistic result and thus harmful to the seamen. 2 Norris, *The Law of Seamen*, Section 607, pp. 90-91 (1984 supp.).

Accord, Edelman, Vol. 1 *Maritime Injury and Death*, pp. 9-10 (1960) ("This is a right which cannot be contracted away by the crewman or by his union.").

II. National Labor Policy Does Not Mandate the Result Below

Contrary to the Court of Appeals holding, national labor policy will not be impaired if the admiralty courts are free to disregard provisions in collective bargaining agreements setting inadequate rates of maintenance.

The Court of Appeals' premise seems to be that all terms of collective bargaining agreements must be enforced or the nation's policy of promoting industrial peace through the bargaining process may be impinged. There is no evidence to support such a sweeping assertion and that is not the law.

This Court has held that collective bargaining agreements may not be enforced to the extent they are contrary to "well defined and dominant" public policy. *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). The right to maintenance has been well defined and dominant for hundreds of years. *Harden v. Gordon*, 11 Fed. Cas. 480 (CCD Me. 1823) (Case No. 6047) (maintenance and cure are grounded in "the great public policy of preserving this important class of citizens for the commercial service and maritime defense of the nation . . .").

The Court of Appeals' specific rationale for its decision was that the maintenance rate is but one element in the union contract and there may be considerable "give and take" exercised by the parties in coming to a final agreement on all elements. 786 F. 2d at 949. This ignores the fact that a disabled seaman is not aboard ship enjoying the "take," but rather is onshore trying to live on the "give." Maintenance was intended to be imposed on the shipowner and seaman and not to hinge on the vagaries of the market place and "arms length" bargaining. Maintenance was intended to remain at a standard dictated by the costs of adequate food and lodging comparable to that received aboard ship. The Court of Appeals ignores the traditional role of the admiralty courts of protecting the disabled seamen. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952). Inasmuch as protection is due, it should be extended whether the threat is from the shipowners, unions, or both.

The seamen's right to maintenance has been severely undermined by the Court of Appeals.

CONCLUSION

The petitioners respectfully submit that the petition for certiorari should be granted.

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Appendix A

United States Court of Appeals

CORY GARDINER;
WILLIAM E. BISHOP, et al.,

Nos. 84-2354,
84-2547, D.C.
No. CV-83-3681 RPA

Plaintiffs-Appellees,

vs.

Filed April 8, 1986

SEA-LAND SERVICES, INC.,
UNITED STATES
LINES, INC., etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Honorable Robert P. Aguilar, District Judge, presiding
Argued and Submitted May 17, 1985
San Francisco, California

Before: TANG and FLETCHER, CIRCUIT Judges and Hill,[1]
District Judge.

TANG, Circuit Judge:

Pursuant to 28 U.S.C. Section 1292(b), Defendants-Shipowners appeal the District Court's denial of their motion to dismiss or for summary judgment. The issue presented is whether the provision in a seamen's collective bargaining agreement calling for a rate of maintenance

[1]Honorable Irving Hill, United States District Judge for the Southern District of California, sitting by designation.

will be held binding and will be enforced even if, when viewed in isolation, the rate fixed in the agreement is inadequate. The district court held that union members are not bound by such a rate of maintenance and it could not be enforced.

I. BACKGROUND

In August, 1983, seven seamen who belong to maritime unions filed an action on behalf of themselves and a proposed class of similarly-situated seamen (Seamen) against eight maritime employers and a proposed defendant class represented by those employers (Shipowners). The seamen assert a right under maritime law to maintenance payments from the Shipowners greater than the daily rate of $8.00 called for in the collective bargaining agreements between the Shipowners and the Seamen's unions.

The parties stipulated that the Shipowners would move for dismissal and/or summary judgment on the ground that the Plaintiffs were not entitled to the relief sought and that Defendants were entitled to judgment on the merits. Defendants argued that the collectively-bargained maintenance rates were enforceable as a matter of law. The parties also agreed that if the motion were denied, they would join in a motion for certification for interlocutory appeal under 28 U.S.C. Section 1292(b), and that all further proceedings would be stayed pending the appeal.

On August 1, 1984, the district court denied the Shipowners' motion based upon its reasoning in a prior published order, *Rutherford v. Sea-Land Services, Inc.*, 575 F. Supp. 1365 (N.D. Cal. 1983). In *Rutherford*, the court surveyed the legal principles underlying the maritime right to maintenance. Based on the principle that "no private agreement may abrogate the right," *id.* at 1371 (citing, *inter alia*, *Cortes v. Baltimore Insular Lines*, 287 U.S. 367, 371 (1932), the court held that:

> [a]seaman who becomes ill or injured while in the service of his ship is not bound by the maintenance figure set forth

> in a collective bargaining agreement in instances in which the payment is not adequate to provide him with lodging and three meals per day of the kind and quality he would have received aboard the vessel.

Id. at 1370. Without review the polices underlying federal labor law, the court concluded that "the public policy in support of the ancient right of maintenance must be found to outweigh the national labor policy" of enforcing collective bargaining agreements. *Id.* at 1373. Additionally, the court took judicial notice that a daily maintenance rate of $8.00 is inadequate to obtain food and lodging in the San Francisco Bay area of a quality comparable to that aboard ship. *Id.* at 1370.

In its order denying Defendants' motion, the District Court certified the issue just discussed for interlocutory appeal under 28 U.S.C. Section 1292(b). This court granted the petition for permission to appeal by order dated October 9, 1984.

II. MARITIME RIGHT TO MAINTENANCE

The Seaman's right to maintenance dates back to the Middle Ages. Gilmore and Black, *The Law of Admiralty* 281 2d ed. 1975). "Maintenance" is the duty of a shipowner to provide food and lodging to a seaman who falls ill or becomes injured while in the service of the ship. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528 (1938). The right to maintenance is tied to the right to cure, i.e., necessary medical services, and both extend to the point of "maximum recovery." *Vaughn v. Atkinson*, 369 U.S. 527, 531 (1962). In addition, a seaman is entitled to recover unearned wages. *The Osceola*, 189 U.S. 158, 175 (1903); Norris, *The Law of Seamen*, Section 26.7 at 15-16 (4th ed. 1985). In sum, the elements of the common law maintenance and cure action included a living allowance during the recovery period (maintenance), reimbursement for medical expenses (cure), and unearned wages for the period from the onset of injury or illness until the end of the voyage. Gilmore and Black, 281, 305, 309.

Traditionally, maintenance has been said to serve three purposes: (1) to protect the poor and improvident seaman while ill

in foreign ports, (2) to encourage shipowners to protect the seaman's safety and health while in service, and (3) to induce employment in the merchant marine. *See Vella v. Ford Motor Co.*, 421 U.S. 1, 3-4 (1975), *quoting Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727 (1943); *Gypsum Carriers v. Handelsman*, 307 F. 2d 525, 536 (9th Cir. 1962).

The duty to provide maintenance is imposed by law. *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371 (1932) (*per* Cardoza, J.). The obligation is said to be an incident of the status of the seaman, and "contractual" only in that the obligation has its source in the employment relationship relationship. *Id.* Although courts have sometimes characterized the duty as an "implied contract provision," *see e.g., Aguilar v. Standard Oil Co.*, 318 U.S. 724 730 (1943), they have consistently held that the right to maintenance cannot be abrogated by contract, *Cortes*, 287 U.S. at 371.

Case law defines the extent of the right to maintenance, and how it is measured. The seaman is entitled to food and lodging of the kind and quality of that which he would receive aboard ship. *Calmar S.S. Corp.*, 303 U.S. at 528. Traditionally, the right was restricted to actual out-of-pocket expenses. Gilmore and Black at 305; *Johnson v. United States*, 333 U.S. 46 (1948). However, more recent cases have awarded a flat per diem rate without further inquiry. Gilmore and Black at 307. A rate of $8.00 per day was judicially established in the late 1940's. *Id.* Apparently that rate has been continued down to the present time in many places, both as the rate to be paid to individual non-union seamen and the rate frequently established in collective bargaining agreements. Very recently, the $8.00 rate has been successfully challenged in cases involving individual non-union seamen. *See e.g., Incandela v. American Dredging Co.*, 659 F. 2d 11, 14 (2d Cir. 1981).

When the $8.00 rate established in a collective bargaining agreement has been challenged by one or more union members, the District Courts have not reached uniform results. For example, the contract provision was enforced in *Gropve v. Dixie Carriers, Inc.*, 553 F. Supp. 777 (E.D. La. 1982) and

Hodges v. Keystone Shipping Co., 578 F. Supp. 620 (S.D. Tex. 1983) and denied enforcement in *Rutherford*, 575 F. Supp. 1365. We are apparently the first Court of Appeals to decide whether the $8.00 rate as established in a collective bargaining agreement should or should not be enforced.

III. DISCUSSION

The Shipowners advance two primary reasons to justify enforcement of the maintenance rate contained in the collective bargaining agreement. First, they argue that federal labor legislation has preempted maritime law. Second, they argue that absent preemption, the give and take process of collective bargaining and the range of other benefits accruing to seamen as a consequence of collective bargaining justify enforcement of the contracted maintenance rate.

A. Preemption

In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), the Supreme Court articulated a test for determining the preemptive effect of a federal statute over federal common law.[2]

Referring to *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (Court refused to provide damages for "loss of society" under general maritime law when not provided for in Death on High Seas Act), the Court stated that the question was whether the legislative scheme "spoke directly to a question," not whether Congress had affirmatively proscribed the use of federal common law. *City of Milwaukee*, 451 U.S. at 315. Maritime law will be preempted by statute if applying that common law would entail "rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil*, 436 U.S. at 625. Thus where Congress has spoken, courts "need not pause to evaluate . . . opposing policy arguments. . . [for] Congress has struck the balance for [the courts]." *Id.* at 623. In evaluating the

[2]Admirality jurisdiction has long been recognized as an area in which federal courts may make federal common law. *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 652 (1981).

displacement issue, courts must assess the scope of the legislation and whether the legislative scheme addresses the problem formerly governed by federal common law. *City of Milwaukee*, 451 U.S. at 315 n.8.

The Shipowners claim that the labor statutes "speak directly" to and preempt the maritime right to maintenance in two ways. First, the Shipowners contend that non-enforcement of the maintenance provision subverts the statutory mandate that unions be the exclusive representatives of their members in bargaining with the employer. 29 U.S.C. Section 159(a). The Shipowners imply that enforcement of the provision promotes the policy of allowing employees to engage in negotiations with respect to the rate of maintenance. We find this contention unconvincing. The exclusive representation principle has been restricted to situations in which employees on their own initiative have accepted terms of employment outside those of a collective bargaining agreement, or sidestepped the authority of the union to impose obligations upon its members. *See Scofield v. NLRB*, 394 U.S. 423 (1969); *Hendricks v. Airline Pilots Association International*, 696 F. 2d 673 (9th Cir. 1983); *NRLB v. Tanner Motor Livery, Ltd.*, 419 F. 2d 216 (9th Cir. 1969). In the instant case, the employees are not acting on their individual authority, but under the authority of externally-imposed maritime law.

Second, the Shipowners contend that non-enforcement of the maintenance provision conflicts with a provision in the Labor Management Relations Act which provides for an exclusive judicial procedure by which union members may press claims or grievances against their employer or union arising from the dissatisfaction with the collective bargaining process. 29 U.S.C. Section 185(a). By its language, however, Section 185(a) does not apply to the Seamen's claims. This provision applies to "[s]uits for violation of contracts" between employers and labor organizations.

The Seamen brought suit, not for violation of the collective bargaining agreement, but for a violation of maritime law. The

Seamen brought suit pursuant to the district court's admiralty jurisdiction. 28 U.S.C. Section 1333(1). Thus, Section 185(a) does not have preemptive effect.

We note that refusal to enforce the collectively-bargained maintenance rate would vitiate somewhat several of the policies underlying the federal labor laws. These include the policy of enforcing a collective bargaining agreement in order to promote stability in labor-management relations, *see Toyota Landscape Co. v. Building Material and Dump Truck Drivers Local 420*, 726 F. 2d 525, 529 (9th Cir.), *cert. denied*, 105 S. Ct. 104 (1984), the policy that the terms of agreements are to be determined by the free play of economic forces, *see Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 n.4 (1976), the principle of self-government by employees and the democratic process of union representation.

However, these conflicts are of a less direct nature than the conflict between the federal statutory law and federal common law which gave rise to pre-emption in the cases cited by the Shipowners. In *Mobil Oil*, the Court refused to provide damages for "loss of society" under maritime law when Congress had not provided for such damages in the Death on the High Seas Act. 436 U.S. at 625. That Act considered issues such as the beneficiaries, the limitations period, contributory negligence, survival, and damages under a wrongful death action. *Id.* Since Congress had "spoken directly" to the question of damages, the Court did not feel free to "supplement" Congressional action by prescribing a remedy. *Id.*

In *City of Milwaukee*, the Court determined that the 1972 Amendments to the Federal Water Pollution Action "had not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts . . . , but rather [had] occupied the field through the establishment of a comprehensive regulatory program supervised by an expert agency." 451 U.S. at 317. For example, the Court found that the problem of effluent lim-

itations for discharges from treatment plants had been addressed through the administrative scheme, and that there was no basis for federal courts to impose more stringent limitations. *Id.* at 1795-96. *See also Matter of Oswego Barge Corp.*, 664 F. 2d 327 (2d Cir. 1981).

In sum, it does not appear that Congress has "spoken directly" to the question of a seaman's traditional right to maintenance through the federal labor laws. We conclude therefore that federal labor statutes have not preempted maritime law.

B. Quid Pro Quo

Although the principles of maritime law with respect to the seaman's right to maintenance have not been preempted by federal labor statues, we conclude that the broad policies which undergird the labor laws, as well as the nature of the collective bargaining process, require nevertheless that the maintenance rate expressed in the collective bargaining agreement be enforced.

Important policies support the enforceability of the maintenance rate involved in this case, policies unduly discounted and undervalued by the district court in *Rutherford.* Congress viewed collective bargaining as a key instrument in its effort to promote industrial peace. *Hendricks,* 696 F. 2d at 676. Our national labor policy is built on the premise that employees can bargain most effectively for improvements in wages, hours, and working conditions by pooling their economic strength and acting through freely chosen labor organizations. *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967). Consequently, this court will not lightly embrace the repudiation of contractual obligations enumerated in a collective bargaining agreement and will "choose the rule that will promote the enforcement of collective bargaining agreements." *Toyota Landscape Co.*, 726 F. 2d at 528 (citing *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957)). Although the right to maintenance is presumed to exist because of its establishment as common law, its rate may be subject to the negotiation process. "The collective agreement covers the whole employment

relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers of America v. Warrior & Gulf Navy Co.*, 363 U.S. 574, 578-79 (1960). "Thus, it is clearly the policy of our national labor legislation to encourage both labor and management to negotiate contracts that will effectively regulate every aspect of their complex relationship." *Winston-Salem Printing Pressmen v. Piedmont Publishing Co.*, 393 F. 2d 221, 225-26 (4th Cir. 1968). As the Supreme Court has noted, "[t]he mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time." *United Steelworkers of America*, 363 U.S. at 580.

Here, the parties to the agreement included the traditional right to maintenance as a subject of the negotiating process. The resulting collective bargaining agreement incorporated an explicit rate of maintenance as one of its terms. We cannot fairly say that this rate, as a consequence of the normal "give and take" process of collective bargaining, is not entitled to the same reliability accorded to other terms and conditions within the same agreement. The national labor policy of promoting and encouraging collective bargaining agreements would be unduly compromised were we to conclude otherwise.

In considering the collective bargaining process which occurred in this case, we first note that there has been no allegation that the collective bargaining agreement as a whole is unfair or inadequate. This is significant because we do not believe the rate of maintenance specified in the collective bargaining agreement can be examined in isolation. "The rate of maintenance is but one of many elements contained within the Union contract and over which the parties negotiate, and there may be a considerable amount of 'give and take' exercised by the parties in coming to a final agreement on all of the elements." *Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777, 780 (E.D. La. 1982). Although traditional maritime law would not substitute wages, paid vacation or accumulated leave time for

maintenance, *Morel v. Sabine Tower & Transportation Co.*, 669 F. 2d 345, 346-47 (5th Cir. 1982), the nature of the "give and take" process of collective bargaining suggest that acceptance of a particular package of benefits should be binding on the union members. The contract at issue in this case provides for overtime, premium and penalty pay for unpleasant tasks, for very generous vacation allowances, and for such amenities as television sets and feature films, washers/dryers, ice cream and fresh baked bread. The adequacy of the maintenance rate should not be examined in isolation by the court because the determination of its adequacy in relation to the whole scheme of benefits has already been made by the union and the seamen who voted for the contract. We note that courts which have held that seamen must receive more than $8.00 for maintenance were deciding on the adequacy of the rate for *nonunion* seamen. *See e.g., Incandela*, 659 F. 2d at 13; *Caulfield v. AC & D Marine, Inc.*, 633 F. 2d 1129, 1132 (5th Cir. 1981); *Tate v. American Tugs, Inc.*, 634 F. 2d 869 (5th Cir. 1981); *Gauthier v. Crosby Marine Service, Inc.*, 499 F. Supp. 295 (E.D. La. 1980); *Robinson v. Plimsoll Marine, Inc.*, 460 F. Supp. 949 (E.D. La. 1978).

A second consideration which persuades us the bargained for rate should be enforced is that the facts in this case demonstrate that there was real bargaining over the maintenance rate. In 1975 the Marine Engineers Beneficial Association requested an increase in the maintenance rate to $20.00 and in 1981 the Seafarers International Union asked for an increase to $12.00. Both proposals were withdrawn as part of the give and take of collective bargaining. Thus, the parties have bargained for maintenance as a part of the overall benefits package. In addition to maintenance and unearned wages to the end of the voyage (the traditional right of maintenance), and full health and hospitalization benefits (the traditional right to cure), the ill or injured seaman receives free transportation to his home port and a disability pension. We hold that when a benefits package includes an express reference to a precise rate of

maintenance, the adequacy of this rate, considered in isolation, is not a subject for judicial speculation when the rate is part of a total package of wages and benefits resulting from the process of collective bargaining.

Vitco v. Joncich, 130 F. Supp. 945 (S.D. Cal 1955), *aff'd*, 234 F. 2d 1161 (9th Cir. 1956), is not controlling here. In *Vitco*, the district court invalidated a contract provision which allowed the employer to withhold the unearned wages of seamen incapacitated due to illness while preserving the unearned full wages for seamen incapacitated due to injury. The court reasoned that this abrogation of the right to wages was contrary to public policy. 130 F. Supp. at 951. Unlike the contract in *Vitco*, "which without *quid pro quo* deprive[d] a seaman of wages because of unavoidable illness during the term of his employment," *id.* at 951, the contract here does not abrogate a maritime right. Rather, it expressly recognizes the maritime right to maintenance and seeks to preserve it as part of the overall negotiating process. We wish to emphasize that *Vitco* continues to have vitality and will control should a situation arise in which a mere token amount is designated for maintenance without a genuine *quid quo* arrived at through collective bargaining.

IV. CONCLUSION

We conclude that the national labor policy of encouraging the use and reliability of collective bargaining agreements, together with the realistic give and take occurring within the collective bargaining process, justify enforcement of the specified rate of maintenance contained in the agreement here. The district court's denial of the Defendants' motion for summary judgment is REVERSED and the cause is REMANDED for proceedings consistent with this opinion.

GARDINER v. SEA-LAND SERVICE, INC., Nos. 84-2354, 84-2547 FLETCHER, Circuit Judge, concurring and dissenting:

I concur in that portion of the majority opinion that concludes federal labor statutes have not preempted federal maritime common law. I respectfully dissent, however, from the majority's conclusion that a union can bargain away the individual seaman's common law right to maintenance by agreeing to a wholly inadequate figure as a daily maintenance rate.

The ancient right to maintenance originated in medieval sea codes. G. Gilmore & C. Black, *The Law of Admiralty* Section 6-6, at 281 (2d ed. 1975). The purposes of maintenance are to protect "poor and friendless" seamen from the broad variety of hazards encountered at sea, to encourage seamen "to engage in perilous voyages with more promptitude, and at lower wages," and to promote marine commerce. *Vella v. Ford Motor Co.*, 421 U.S. 1, 3-4 (1975); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727 (1943); G. Gilmore & C. Black, *supra*, Section 6-6, at 281 (quoting *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6047)). The doctrine imposes liability regardless of fault and arises out of the employment relationship. *Aguilar*, 318 U.S. at 730.

The duty to pay maintenance is imposed by the general maritime law. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932); 2 M. Norris, *The Law of Seamen* Section 26:8, at 20 (4th ed. 1985). No private agreement is competent to abrogate the shipowner's duty to pay maintenance. *DeZon v. American President Lines, Ltd.*, 318 U.S. 660, 667 (1943); *Cortes*, 287 U.S. at 371. The right to maintenance consists of the right to payments sufficient to provide the seaman with food and lodging of the kind and quality received aboard ship. *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 528 (1938). These Supreme Court cases that recognize the broad reach of maintenance and its historic origins rooted in the genesis of maritime law compel my dissent. If changes in the law of maintenance are to be effected, such changes should originate with Congress, not this court.

Although the majority concludes that "federal labor statutes have not preempted maritime law [relating to maintenance]," it nonetheless allows a union to bargain away the individual seaman's right to maintenance. It requires only that the collective bargaining agreement include an "express reference" to maintenance. In effect, as long as the parties to a collective bargaining agreement formally designate some nominal figure as a daily maintenance rate, a disabled seaman cannot recover even the cost of inexpensive food and lodging.

A number of incongruities and inequities may result from the majority's holding. For example, seamen with favorable bargaining agreements that contain no maintenance terms would be entitled to receive the full cost of their food and lodging when injured or ill, while those with less favorable bargaining agreements that specify a nominal maintenance rate would receive only that inadequate maintenance. Or union seamen and non-union seamen working for the same employer might receive different maintenance rates. Since the premise underlying maintenance is that seamen and their unions are unable or too improvident to protect disabled seamen's interests adequately, it is anomalous for this court to rubberstamp any bargained-for amount as long as it is labelled "maintenance."

I find the district court's approach in the case at bar, following its decision in *Rutherford v. Sea-Land Service, Inc.*, 575 F. Supp. 1365 (N.D. Cal. 1983), to be sound. The district court in *Rutherford* held that a seaman should be permitted to challenge a bargained-for maintenance rate if he can demonstrate that it is "inadequate to provide [him] with food and lodging of the kind and quality he would have received aboard [his] vessel. . . .according to his circumstances (*i.e.*, where he recuperated. . . .)." *Id.* at 1374. If a seaman cannot demonstrate that the bargained-for maintenance rate falls below this minimal threshold, then courts should not repudiate the bargained-for rate. As long as the maintenance rate on which the parties have agreed equals or exceeds this minimum threshold of adequacy,

courts should treat it as a legitimate subject of collective bargaining that should not be disturbed.

Fed. R. Evid. 201(b) permits a court to take judicial notice of a fact if it is "not subject to reasonable dispute in that it is either (1) generally known with the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The district court in *Rutherford* reviewed a number of recent cases finding $8.00 per day to be inadequate and awarding higher maintenance amounts based on actual expenses. *See id.* at 1370. Based on these authorities, the district court concluded that "it is now generally recognized that $8.00 per day is no longer a sufficient sum for a seaman to secure lodging and three meals." *Id.* The district court therefore appropriately took judicial notice that a maintenance rate of $8.00 per day in San Francisco is inadequate. *Id.* I thus conclude that the seaman is not bound by the maintenance provision in the collective bargaining agreement. I would affirm the district court.

APPENDIX B

CORY GARDINER, ET AL., Plaintiff

v.

SEA-LAND SERVICES CO., ET AL., Defendants

United States District Court, Northern District of California, August 1, 1984
No. C-83-3681 RPA

ROBERT P. AGUILAR, D.J.:

On July 26, 1984, the above-captioned matter came on for hearing on motions to dismiss or for summary judgment filed by various defendants. The Court has received and read extremely voluminous briefs, and has heard oral argument of counsel. After reviewing the relevant authorities, the Court hereby enters the following Order.

I.

All plaintiffs in this action belong to unions that have entered into collective bargaining agreements with defendant shipping companies. Each of the collective bargaining agreement contains a clause that sets the rate of maintenance at $8.00 per day. The central question raised by defendants' motions to dismiss or for summary judgment is whether union members are absolutely bound by the rate of maintenance established in collective bargaining agreements between the unions and the employers.

This is the same question that the Court addressed in the case of *Rutherford v. Sea-Land Service, Co.*, 575 F. Supp. 1365 (N.D. Cal. 1983). In *Rutherford*, the Court determined that, although parties may surely contract with respect to the rate of maintenance, parties may not set a rate so low as to abrogate

the right to maintenance. Based on this determination, the Court denied defendant's motion to dismiss in the *Rutherford* case.

In all important respects, the motions to dismiss or for summary judgment in the instant case are indistinguishable from those in the *Rutherford* case. Although defendants herein have presented outstanding briefs and have argued their position most convincingly, the Court still believes that the result in *Rutherford* is the proper resolution of the legal question posed. The Court incorporates *in toto* the reasoning set forth in *Rutherford*, and hereby denies defendants' motions to dismiss or for summary judgment.

Although the Court will stand by its decision in *Rutherford*, the Court recognizes that these motions present a very close question, and a question of first impression within this Circuit. The Court finds that the issues presented in defendants' motions to dismiss or for summary judgment meet the requirements for interlocutory appeal as set forth in 28 U.S.C. Section 1292(b). This Order "involves a controlling question of law as to which there is substantial ground for difference of opinion." Further, "immediate appeal from the order may materially advance the ultimate termination of the litigation." Accordingly, the Court hereby certifies this order for interlocutory appeal pursuant to 28 U.S.C. Sec. 1292(b).

II.

Defendants have also moved to require plaintiffs to join their unions as defendants in this action or suffer dismissal. Defendants' contention is based on Federal Rule of Civil Procedure 19(a). The Court has carefully studied the cases cited by defendants in their motion. Although the cases appear to favor the joinder of unions as defendants, these cases involved instances in which the Court's resolution of the case required interpretation of a collective bargaining agreement or challenges the overall validity of an agreement. The union's interest in such litigation is obvious.

This case, on the other hand, does not require the Court to interpret the collective bargaining agreements in any way. Nor does the case call into question the overall validity of the agreements. Rather, this case simply requires the Court to determine whether a single, severable clause of the collective bargaining agreements is valid. Accordingly, the Court hereby denies the defendants' motion to require plaintiffs to join their unions as defendants.

III.

Defendants also move to dismiss par. 24 of the plaintiffs' complaint. In par. 24 plaintiffs ask the Court to "set a uniform and adequate maintenance rate for plaintiffs." Defendants argue that it would be inappropriate for the Court to set flat rate of maintenance to apply to all members of the plaintiff class.

As the Court recognized in the *Rutherford* opinion, parties may contract with respect the rate of maintenance. The parties may establish a flat rate of maintenance applicable to everyone covered by the contract. However, absent a contractually established rate of maintenance, the rate of maintenance must be set on a case-by-case basis. See *Rutherford*, 575 F. Supp. at 1370-71, 1374.

In response to the motion, and the general rule that, absent a contract, maintenance is limited to expenditures, plaintiffs suggest that the Court might set a minimum rate for a geographical area. Plaintiffs refer to such a flat rate as a "starting point" for the future. The Court agrees with defendants that this "starting point" is much different than what plaintiffs seek in par. 24 of their complaint. Plaintiffs are not entitled to the relief requested in par. 24. Plaintiffs may, however, be entitled to a Court order establishing a "starting point" or a minimum rate for a geographical area. Accordingly, the Court will grant defendants' motion to dismiss par. 24 of the plaintiff's complaint. The Court will, however, give plaintiffs' leave to file an amended version of par. 24 in which they may seek a more limited form of relief, such as the "starting point."

IV.

Plaintiffs argue that defendant Sea-Land Services is collaterally estopped from making a motion to dismiss or for summary judgment because it lost the same motion in the *Rutherford* case. Because the Court never issued a final order or judgment in the *Rutherford* case, the doctrine of collateral estopped cannot be used to bar Sea-Land Services' motion in this case.

V.

Finally, defendant Chevron Shipping moves to dismiss on the ground that none of the named plaintiffs ever worked for Chevron. Earlier in this litigation, the parties and the Court agreed that the central issue, discussed in the first portion of this Order, should be resolved before any other issues are addressed. By making this motion to dismiss, Chevron has breached this agreement. While the Chevron motion may be appropriate later in this litigation, it is not timely at the present time. Accordingly, the Court hereby denies Chevron's motion to dismiss.

APPENDIX C

Robert W. RUTHERFORD, Plaintiff,

v.

SEA-LAND SERVICE, INC., a corporation, Defendant.

No. C-83-1433 RPA.

Unites States District Court
N.D. California.

Nov. 21, 1983.

OPINION AND ORDER

AGUILAR, Distict Judge.

This action is before the Court on defendant shipowner's motion to dismiss or for summary judgment. Plaintiff is a merchant seaman and a member of the International Seafarers Union. Plaintiff's union has a collective bargaining agreement with defendant shipowner. One provision of the collective bargaining agreement limits defendant shipowner's duty of maintenance to $8.00 per day. Plaintiff brought this action against defendant shipowner seeking a sum greater than $8.00 per day in maintenance. Plaintiff contends that $8.00 per day is an unreasonably low rate of maintenance. Defendant responds that plaintiff is absolutely bound by the terms of the collective bargaining agreement. On this basis, defendant moves to dismiss plaintiff's complaint, or in the alternative for summary judgment.[1]

[1]The Court has recently received defendant's request that this Court hold in abeyance its ruling on defendant's motion until such time as the parties can submit further briefing. The Court hereby denies that request. The Court believes that the matter has been adequately briefed, and the Court feels confident that it has read all the relevant authorities. Further briefing would serve no purpose other than delay.

The sole question before the Court at this time is whether a collectively bargained daily rate of maintenance is absolutely binding upon ill or injured union members, without regard to the reasonableness or adequacy of the daily rate of maintenance.

Plaintiff is a merchant seaman and an active member of the International Seafarers Union. On March 20, 1982, plaintiff was injured when he was beaten up by a fellow crew member. At the time of his injury, plaintiff was the chief steward of the M/V Voyager, a freight vessel owned by defendant, which was temporarily docked in Long Beach.

Plaintiff received initial medical treatment in a hospital in Long Beach, and was then told to obtain further treatment in the San Francisco Bay Area. Plaintiff apparently has his home in the Bay Area. Plaintiff has since recovered from his physical injuries, but claims that he still suffers emotional trauma from the beating. Plaintiff asserts that he remains unfit for duty as a seaman.

As will be discussed in greater detail, *infra*, a seaman who is injured while in the service of a ship is entitled to "maintenance and cure" from the shipowner. Maintenance and cure is the food, lodging and medical care required by the seaman until he reaches the point of maximum medical recovery.

Plaintiff's union, the International Seafarers Union, has a collective bargaining agreement with defendant shipowner. The collective bargaining agreement set the rate of maintenance payments at $8.00 per day. The applicable provision of the collective bargaining agreement provides:

> When a member of the unlicensed personnel is entitled to maintenance and cure under maritime law, he shall be paid maintenance and cure at a rate of Eight Dollars ($8.00) per day for each day or part thereof of entitlement. The payment due hereunder shall be paid to the man weekly. This payment shall be made regardless of whether he has or has not retained an attorney, filed a claim for damages, or taken any other steps to that end and irrespective of any insurance agreement in effect between the Company and any insurer.

Article II, Section 13, New Standard Freightship/Passenger Agreement, June 16, 1981—June 15, 1984.

Plaintiff accepted the $8.00 per day maintenance payments from defendant for approximately three months. Plaintiff thereafter refused to accept maintenance payments at this daily rate because defendant conditioned the payments upon plaintiff's waiver of any ultimate recovery of a greater daily maintenance payment.

On March 25, 1983, Plaintiff filed this action for maintenance against defendant. Plaintiff asks the Court to declare that the collective bargaining agreement limiting maintenance to $8.00 per day is unreasonable and unenforceable under general maritime law. Plaintiff also seeks an award of adequate and reasonable daily maintenance.[2]

By its motions to dismiss or for summary judgment, defendants contends that plaintiff is bound by the terms of the collective bargaining agreement negotiated by his union on his behalf. Thus, defendant argues that as a matter of law plaintiff can recover no greater daily sum for maintenance than the amount established in the collective bargaining agreement. Plaintiff counters defendant's motion by arguing that $8.00 per day is an unreasonably low daily rate of maintenance in light of the actual cost of food and lodging in the San Francisco Bay Area. Plaintiff contends that the right to reasonable maintenance cannot be limited by a collective bargaining agreement.

"Maintenance" is the duty of the shipowner to provide food and lodging to a seaman who becomes ill or injured while in the service of the ship. The shipowner's duty of maintenance continues until the seaman reaches the point of maximum medical

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[2]Plaintiff's lawsuit also involves a dispute as to the period of time during which plaintiff is entitled to maintenance. Defendant contends that plaintiff became fit for duty on October 29, 1982, and so is not entitled to maintenance payments beyond that date. Plaintiff contends that he is not yet fit for duty, and remains entitled to maintenance payments. This dispute will not be discussed further in this Opinion as it is not relevant to defendant's current motion.

recovery. *Vaughn v. Atkinson*, 369 U.S. 527, 531 (1962); *Caulfield v. AC&D Marine. Inc.*, 633 F. 2d 1129, 1131 (5th Cir. 1981). The duty of maintenance is coupled with the duty of cure: to provide the ill or injured seaman with proper medical care until the seaman reaches the point of maximum medical recovery. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528, 531-32 (1938).

Maintenance and cure is a right granted by general maritime law. It has been recognized for hundreds of years. In fact, the duty of the shipowner to provide for the ill or injured seaman can be traced as far back as the Sea Codes of the Middle Ages. 2 Norris, *The Law of Seaman*, § 540 (1970).

The duty to provide maintenance and cure arises from the unique hazards attendant to the work of seamen. Its purpose is to foster the combined goals of encouraging marine commerce and assuring the well-being of the seaman. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727 (1943). The purpose of, as well as the need for, the duty to provide maintenance and cure were aptly described by Justice Story in 1832:

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behaviour might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt.
>
> On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well as prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to

> abandon the sick to their forlorn fate, but his duty, combining with the interest of the his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency.
> *Harden v. Gordon*, 11 Fed. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6047).

A lawsuit by a seaman to recover maintenance is separate and distinct from a suit for injury under the Jones Act. Norris, *supra*, Section 545, n. 11. The duty to provide maintenance to the ill or injured seaman is imposed irrespective of the presence or absence of negligence on the part of the seaman or the shipowner. *Id.*

The ill or injured seaman is entitled to the maintenance that is sufficient to supply him with food and lodging of the kind and quality he would receive if he were still on board the vessel. *Calmar S.S. Corp. v. Taylor*, 303 U.S. at 528. The monetary value of such maintenance is a question of fact to be resolved by the trial court based upon all of the evidence before it. Norris, *supra*, Section 607, n.6. The evidence that can be considered by a court in determining the appropriate award for daily maintenance includes: the costs the seaman incurs in acquiring food and lodging, expert testimony regarding the cost of food and lodging in the area, rates of maintenance provided in local union contracts, and previous awards ordered by the courts. Evidence of the seaman's actual expenditures is the preferred method of determining the amount of the daily maintenance payment owed to the seaman. *Morel v. Sabine Towing & Transportation Co., Inc.*, 669 F. 2d 345, 347 (5th Cir. 1982).[3]

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[3]It should be noted that maintenance payments for lodging are not owed to the seaman by the shipowner when the seaman lives with his parents, or with other persons who do not charge for the seaman's lodging, while he is recuperating. Norris, *supra*, Section 572, n.10. Unless stated otherwise, the Court assumes in its Opinion that money for both food *and* lodging are required by the ill or injured seaman.

In the 1950's the trial courts, as one court recently phrased it, "fell into the habit" of awarding maintenance at a rate of $8.00 per day. *Incandela v. American Dredging Co.*, 659 F. 2d 11, 14 (2nd Cir. 1981). With the advent of collective bargaining agreements in the 1960's, the union and the shipowners made the rate of maintenance a subject of negotiation, and uniformly adopted the $8.00 figure as the daily rate of maintenance.

In recent cases for maintenance where a seaman is not bound by a collective bargaining agreement that sets forth the amount of daily maintenance, courts have found that the common $8.00 per day award is a "starvation payment," *Harper v. Zapata Off-Shore Co.*, 563 F. Supp. 567, 582 (E.D. La. 1983), and an "unfulfilled promise to seamen that their maintenance needs will be met." *Incandela*, 659 F. 2d at 14. In those cases the courts have awarded maintenance well in excess of $8.00 per day. *Caulfield v. AC&D Marine*, 633 F. 2d at 1132-33 ($15.00 per day); *Robinson v. Plimsoll Marine, Inc.*, 460 F. Supp. 949, 950 (E.D. La. 1978) ($15.00 per day); *Morel v. Sabine Towing*, 669 F. 2d at 347 ($20.00 per day); *Autin v. Otis Engineering Corp.*, 641 F. 2d 197, 199 (5th Cir. 1981) ($20.00 per day); *Incandela*, 659 F. 2d at 14 ($26.80 per day). Each of these courts looked primarily to the actual expenses of the seamen in making these daily maintenance awards. Thus, it is now generally recognized that $8.00 per day is no longer a sufficient sum for a seaman to secure lodging and three meals. 1B *Benedict on Admiralty* Section 51, pp.4-74 (1982); *cf. Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777, 780 (E.D. La. 1982).

In considering the adequacy of $8.00 per day for securing food and lodging in the San Francisco Bay Area, this Court must agree with the *Harper* and *Incandela* courts' description of the $8.00 per day maintenance figure. Since the 1950's when the $8.00 per day figure was originally set, there has been an astounding increase in the cost of food and lodging. The expectation that a seaman can rent a room and purchase three meals on $8.00 per day in the San Francisco Bay Area is unrealistic, if not pure fantasy. The reality of the seaman's inability to

obtain food and lodging in the Bay Area for any figure close to $8.00 per day is a fact of which the Court may, and will, take judicial notice. Fed. R. Evid. 201(b).[4]

Even though it is clear that a seaman will be unable to secure a room and three meals a day in the San Francisco Bay Area on $8.00, the question for the Court is whether the seaman is nevertheless limited to the $8.00 per day maintenance payment by the collective bargaining agreement between his union and defendant shipowner. The Court holds that a seaman who becomes ill or injured while in the service of his ship is not bound by the maintenance figure set forth in a collective bargaining agreement in instances in which the payment is not adequate to provide him with lodging and three meals per day of the kind and quality he would have received aboard the vessel. Whether the maintenance figure in the collective bargaining agreement is adequate to provide the seaman with such lodging and meals is necessarily an individual determination. The Court will make this determination on a case-by-case basis, based upon the needs of the particular seaman and the costs of food and lodging in the locality where the seaman is recovering.[5]

Courts have diligently protected the historic right to maintenance from contractual arrangements, and have often emphasized the non-contractual nature of the right. As earlier noted, the duty to provide maintenance and cure is imposed upon the shipowner by maritime law. *The Iroquois*, 194 U.S. 240, 242 (1904). This duty is "annexed" to the seaman's employment on the ship, and therefore is contractual only "in the sense that it has its source in a relation that is contractual in

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[4]The Court chooses not to rely at this time on plaintiff's submission of the rather high estimate by travel agents of the cost of food and lodging in San Francisco similar to that aboard a vessel. The *actual* cost of such food and maintenance is a question to be resolved in later proceedings. For purposes of ruling upon defendant's motion, it is sufficient for the Court to take judicial notice that $8.00 per day is an unreasonably low sum for obtaining a room and three meals in the San Francisco Bay Area.

[5]Defendant asserts that such case-by-case approach will cause great amounts of litigation and vitiate the certainty

origin." *Cortes v. Baltimore Insular Lines*, 287 U.S. 367, 371 (1932). Thus, once a seaman begins service on a ship, the maritime law annexes the duty of maintenance and cure to the contractual relationship between seaman and employer. *DeZon v. American President Lines.*, 318 U.S. 660, 667 (1943). Though the right of the seaman to maintenance and cure is an incident or implied term of the contract for maritime employment, *Evans v. Blidberg Rothchild Co.*, 382 F. 2d 637, 639 (4th Cir. 1967), the right clearly arises not from the contractual relationship but from general maritime law. *Dryden v. Ocean Accident & Guarantee Corp., Ltd.*, 138 F. 2d 291, 292 (7th Cir. 1943). Thus, based upon the origin of the right to maintenance and cure and its importance, courts hold that no private agreement may abrogate the right. *Cortes v. Baltimore Insular Lines*, 287 U.S. at 371; *DeZon v. American President Lines*, 318 U.S. at 667. In *Dryden*, the Seventh Circuit explained the preeminence of the right to maintenance and cure over any contrary contractual arrangement.

> Concededly an employee-employer relationship is a contractual one. Presumably many of the details of that relationship—wages, hours, etc., are fixed by specific contractual provisions and are express contractual rights. But the right here sought to be enforced [maintenance and cure] by the seaman was not founded on a "meeting of the minds"—it was inexorably attached by ancient and established maritime *law* to every seaman's contract of employment. The parties have no choice in the matter. It was a duty superimposed by *law* coincidental with the formation of the contract relation. The seaman could not contract against it—his employer's will is powerless to destroy it. This aspect alone reflects the true nature of the right here sought to be enforced. It is a right which the maritime law, in the wisdom of experience, found necessary and just, for the complete protection of seamen, whom maritime law has treated as "wards of admiralty."

138 F. 2d at 293. We find this to be good public policy.

Further, in *Vitco v. Joncich*, 130 F. Supp. 945 (S.D. Cal. 1955), a district court in California applied very similar language and reasoning to a case involving a collective bargaining agreement. The court noted that "courts of admiralty, while viewing with favor that which augments [the seaman's historic rights to maintenance and cure], . . . look with disfavor upon agreements in derogation of those maritime rights." *Id.* at 950-51. (Citations omitted.) On the basis of this analysis, the court refused to enforce a term of the employment contract that limited the length of time that a seaman would receive maintenance and cure. *Id.* The Ninth Circuit affirmed this decision and specifically adopted the district court's reasoning. *Joncich v. Vitco*, 234 F. 2d 161, 163 (9th Cir. 1956).

Only one court has directly confronted the question of the enforceability of a collective bargaining agreement that limited daily maintenance payments.[1] In *Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777, the court held that, based upon the above-discussed precedent, it would not enforce a maintenance figure set in a collective bargaining agreement if that figure were so low as to be unreasonable. The court found that approval of low maintenance figures would be tantamount to entirely abrogating the obligation to pay maintenance and cure. *Id.* at 780. However, the court also determined that the rate of $8.00 per day was reasonable. *Id.*

This Court finds that the figure of $8.00 per day to obtain lodging and three meals per day in the San Francisco Bay Area is so low and unreasonable as to abrogate the shipowner's obligation to pay maintenance. To determine whether a particular rate of maintenance is reasonable, the *Dixie Carriers* court used the test of "some point of reasonableness which would be tantamount to abrogating the obligation to pay maintenance

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[1]The other cases cited by the parties, including *Gajewski v. United States*, 540 S. Supp. 381 (S.D. N.Y.1982); *Dixon v. Maritime Overseas Corp.*, 490 F. Supp. 1191 (S.D. N.Y. 1980), *aff'd without opion*, 646 F. 2d 560 (2nd Cir.1980), *cert. denied*, 454 U.S. 838 (1981); and *Tague v. American President Lines*, 1975 AMC 1129 (N.D. Cal. 1975) are clearly distinguishable as none ruled upon the binding character of such a provision.

entirely." 553 F. Supp. at 780. This Court believes that the *Dixie Carriers* court's test is too onerous, and that the proper interpretation of *Cortes, et al.* is that the duty to pay maintenance is abrogated when the maintenance payment provided in the collective bargaining agreement is inadequate to allow the seaman to secure lodging and three meals per day of the kind and quality the seaman would have received aboard the vessel.

The duty to provide maintenance is "no merely formal obligation and it admits of no merely perfunctory discharge." *DeZon v. American President Lines*, 318 U.S. at 667. Providing a maintenance sum that is not adequate for the seaman to secure food and lodging of the kind and quality received aboard the vessel is such a prohibited perfunctory discharge of the duty to provide maintenance to the ill or injured seaman.[2]

The right to maintenance is not simply the right to some provision for food and lodging, no matter what the actual sum be, but the right to lodging and meals of the kind and quality the seaman who have received aboard the vessel. The Court must point out that the quarters of a seaman on a freight vessel are quite basic. If the seaman is not provided with sufficient funds to secure lodging similar to the lodging he had the vessel, he is in essence given insufficient funds to secure any lodging at all. And where the seaman is provided with insufficient funds to secure lodging and meals equivalent to that he received aboard the vessel, the seaman may be forced to choose between securing a room or securing food. The perils of homelessness and malnourishment are those which Justice Story so eloquently stated were to be avoided by the right to, and duty of, maintenance.

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[2]This conclusion is consistent with the holdings of courts that have addressed the scope of the seaman's right to a seaworthy vessel. Seaworthiness is also a right which arises under general maritime law. Courts hold that the seaman's right to a seaworthy vessel cannot be abrogated or limited by contract. *See, e.g., Hudson Waterways v. Schneider*, 365 F. 2d 1012, 1016 (9th Cir. 1966).

In addition, maintenance payments that are sufficient for the seaman to obtain adequate lodging and meals have the effect of encouraging the seaman to return to work on the vessel before he has completely recovered from his illness or injury. A further purpose of maintenance noted by Justice Story was the alignment of the interests of the seaman and the shipowner in the seaman's speedy yet complete recovery. This purpose is frustrated where maintenance payments are so inadequate that the seaman is forced to return to work when not completely recovered.

Where a union and an employer have contractually agreed to a maintenance figure that is inadequate, they have abrogated the ancient and important right to and duty of maintenance. Because the duty of maintenance has an origin independent of any contractual relationship of the parties, the parties' contracts cannot alter that duty.

Various considerations of policy also compel the conclusion reached by this Court. When sitting in admiralty, the Court must be diligent in protecting seamen, who have historically been wards of admiralty. In protecting its wards, the Court is to "avoid . . . the application of the rules of common law which would affect . . . [the seamen] harshly because of the special circumstances attending their calling." *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939). Furthermore, the shipowner's liability for maintenance and cure is among the most pervasive of all, and is not to be defeated by restrictive distinctions nor narrowly confined. Any ambiguities or doubts are to be resolved in favor of the seaman. *Aguilar v. Standard Oil Co.*, 318 U.S. at 735; *see also Vaughn v. Atkinson*, 369 U.S. at 530, 82 S.Ct. at 999. Thus the Court must find unenforceable a collective bargaining agreement that provides a daily maintenance payment that is inadequate to provide the seaman with lodging and meals of the kind and quality he received aboard the ship. *See* Norris, *supra*, Section 607 (1982 Supp.). This finding is necessary in order to give full protection to the ancient right of seamen and to protect the seaman as a ward of the

court. The Court is not holding that the union and the shipowners cannot make the question of the daily rate of maintenance a subject of bargaining. But the Court must, and does, hold that the union and the shipowners have no power to enforce a collective bargaining agreement that provides as seaman with daily payments that are inadequate to meet his maintenance needs.[3]

Defendant contends that a collective bargaining agreement is no mere "private agreement," and its provisions should be enforced in light of the significant national labor policy favoring collective bargaining. Yet, the public policy in support of the ancient right of maintenance must be found to outweigh the national labor policy. The notion that the seaman's right of maintenance can be bargained away is incompatible with the Supreme Court's often expressed view that the right of maintenance cannot be abrogated. The pervasiveness of the ancient right to maintenance is preeminent to the interest in enforcing specific provisions of a collective bargaining agreement.[4] *Janovich v. Vitco*, 234 F. 2d 161.

Defendant also argues that the days of Justice Story's friendless seaman are no more because the seaman now has a powerful friend, and negotiating representative, in the union. Because seamen receive wages and other benefits greater than could have possibly been imagined in Justice Story's time, the defendant asserts that the need to protect the seaman is no longer of the same significance. Nevertheless, no court has found that the ancient right to maintenance is in any way altered by the emergence of unions and collective bargaining

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[3]*Compare Maniatis v. Archipelago*, 159 F. Supp. 245, 247 (E.D. Va. 1958), *rev'd on other other grounds, Penedo CIA Naviera S.A. v. Maniatis*, 262 F. 2d 284 (5th Cir. 1959), which suggests that the rate of maintenance cannot be a subject for contract.

[4]Article 1, Section 2 of the agreement in this case provides that any provision of the agreement in conflict with federal law shall be deemed inapplicable and severed from the agreement. Thus, unenforcement of certain provisions of the agreement is contemplated by the parties.

agreements. In reviewing the benefits provided by the collective bargaining agreement involved in this case, the Court notes that there are no provisions, other than the $8.00 per day maintenance provision, that give lodging and meals to the seaman recovering from illness or injury.[5] The Court finds no basis for re-evaluating the seaman's right to maintenance at this time. The concerns expressed by Justice Story are still present in today's world. The right to maintenance remains an important right of the seaman, and the courts must protect it.

In conclusion, a collective bargaining agreement that establishes a daily rate of maintenance is not binding when the daily rate is inadequate to provide the seaman with food and lodging of the kind and quality he would have received aboard the vessel. Where a seaman seeks to challenge the enforceability of the collective bargaining agreement, he may bring suit and introduce evidence that the daily rate set in the collective bargaining agreement is inadequate. The best evidence of this, as noted earlier, is evidence of the seaman's actual expenditures in securing comparable food and lodging. Once the seaman makes a prima facie case that the daily rate is inadequate, the shipowner has the opportunity to rebut the seaman's evidence. The shipowner might seek to prove that the seaman spent more than necessary to provide him with food and lodging comparable to that provided aboard the vessel, or may seek to prove that the seaman incurred no lodging expenses.[6]

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[5]The repatriation provision of the agreement (Article II, Section 14) does help the seaman in returning to the United States, or to the original port of engagement, upon becoming ill or injured while in the service of the vessel. Thus, the agreement provides that a seaman cannot become abandoned in a foreign port. However, there is no indication that this repatriation provision means that the seaman will be returned to a port where he will incur no expenses for lodging and meals.

[6]For example, in the present case defendant hints that plaintiff has been recuperating at a family home and did not incur lodging expenses. When a seaman has incurred no lodging expenses, the shipowner's duty of maintenance is limited to providing meals. Norris, *supra*, Section 572, n. 10. And if plaintiff's meals were home cooked, defendant may be able to prove that $8.00 per day was adequate to provide plaintiff with three meals per day of the kind and quality provided aboard the vessel and that $8.00 per day was therefore the limit of their duty of maintenance.

But where the evidence shows that the daily maintenance sum set forth in the collective bargaining agreement is insufficient to provide the seaman with adequate maintenance according to his circumstances (i.e., where he recuperated, what quality of lodging and meals he received aboard the ship), the court must disregard this provision of the collective bargaining agreement and award the seaman maintenance that is adequate.

Accordingly, defendant's motion to dismiss or for summary judgment must be denied. Plaintiff has the right to introduce evidence to establish that the $8.00 per day rate of maintenance set forth in the collective bargaining agreement is inadequate to provide him with lodging and meals equivalent to those he received aboard the ship.[7]

Good cause appearing therefor, IT IS HEREBY ORDERED that defendant's motion to dismiss or for summary judgment is DENIED. IT IS FURTHER ORDERED that the parties appear for a status conference on December 15, 1983, at 9:15 a.m.

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[7]Plaintiff suggests that in later proceedings the Court set a rate of daily maintenance, representing the cost of lodging and meals in the San Francisco Bay Area, that can be applied to all lawsuits for maintenance in the Northern District. Such a court-set figure, to the extent it has any binding effect, suffers from many of the same defects as the pre-set limit of maintenance reached between the union and the shipowners. First, the figure would fail to take into consideration changes in the local and national economy affecting the cost of food and lodging, unless the figure were constantly revised. Second, there are too many individual factors applicable in determining a proper maintenance figure for the individual seaman. Such factors include the quality of lodging the particular seaman received aboard the vessel, whether the seaman incurred lodging expenses during his recuperation, and whether the seaman's meals were home cooked. If the parties want the Court to set a figure for maintenance that could serve as a starting point, from which evidence could show that the figure should then be decreased or increased because of the factors affecting the particular seaman, the Court would be willing to consider such a proposal upon request of a party.

APPENDIX D

United States Court of Appeal
For The Ninth Circuit

CORY GARDINER; WILLIAM E. BISHOP, et al.,	Nos. 84-2354, 84-2547 D.C.# CV 83-3681-RPA
Plaintiffs-Appellees,	ORDER DENYING PETITION FOR REHEARING AND EN BANC SUGGESTION

vs.

SEA-LAND SERVICE, INC.,
UNITED STATES LINES, INC., etc., et al.,

Defendants-Appellants.

Before: TANG and FLETCHER, Circuit Judges, and HILL*, District Judge.

The members of the panel voted as follows: Judges Tang and Hill voted to deny the petition for rehearing. Judge Fletcher would grant the petition for rehearing. Judge Tang voted to reject the en banc suggestion and Judge Hill recommends rejection of the en banc suggestion. Judge Fletcher would accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Irving Hill, United States District Judge for the Southern District of California, sitting by designation.